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Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

Report of the Sixth Committee

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I. Introduction

1. The item entitled "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm" was included in the provisional agenda of the sixty-second session of the General Assembly pursuant to Assembly resolution 61/36 of 4 December 2006.

2. At its 3rd plenary meeting, on 21 September 2007, the General Assembly, on the recommendation of the General Committee, decided to include the item in its agenda and to allocate it to the Sixth Committee.

3. The Sixth Committee considered the item at its 12th and 28th meetings, on 23 October and 19 November 2007. The views of the representatives who spoke during the Committee's consideration of the item are reflected in the relevant summary records (A/C.6/62/SR.12 and 28).

4. For its consideration of the item, the Committee had before it the reports of the International Law Commission on the work of its fifty-third[1] and fifty-eighth[2] sessions.

[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1).

[2] Ibid., *Sixty-first Session, Supplement No. 10* (A/61/10).

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II. Consideration of draft resolution A/C.6/62/L.19

5. At the 28th meeting, on 19 November, the representative of New Zealand, on behalf of the Bureau, introduced a draft resolution entitled "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm" (A/C.6/62/L.19).

6. At the same meeting, the Committee adopted draft resolution A/C.6/62/L.19 without a vote (see para. 7).

III. Recommendation of the Sixth Committee

7. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

The General Assembly,

Recalling that the International Law Commission at its fifty-third session[1] completed the draft articles on prevention of transboundary harm from hazardous activities and recommended to the General Assembly the elaboration of a convention on the basis of the draft articles,

Recalling also its resolution 56/82 of 12 December 2001,

Noting that the Commission at its fifty-eighth session completed the draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities and recommended to the General Assembly that it endorse the draft principles by a resolution and urge States to take national and international action to implement them,[2]

Recalling its resolution 61/36 of 4 December 2006, the annex to which contains the text of the principles on allocation of loss in the case of transboundary harm arising out of hazardous activities,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (*a*), of the Charter of the United Nations,

Noting that the questions of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm are of major importance in the relations of States,

Taking into account the views and comments expressed in the Sixth Committee at the sixty-second session of the General Assembly on the prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm,

1. *Welcomes* the conclusion of the work of the International Law Commission on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm and its adoption of the respective draft articles and draft principles and commentaries on the subjects;

2. *Expresses its appreciation* to the Commission for its continuing contribution to the codification and progressive development of international law;

3. *Commends* the articles on prevention of transboundary harm from hazardous activities, presented by the Commission, the text of which is annexed to

[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), paras. 91, 94 and 97.

[2] Ibid., *Sixty-first Session, Supplement No. 10* (A/61/10), para. 63.

the present resolution, to the attention of Governments, without prejudice to any future action, as recommended by the Commission regarding the articles;

4. *Commends once again* the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, presented by the Commission, the text of which was annexed to General Assembly resolution 61/36, to the attention of Governments, without prejudice to any future action, as recommended by the Commission regarding the principles;

5. *Invites* Governments to submit comments on any future action, in particular on the form of the respective articles and principles, bearing in mind the recommendations made by the Commission in that regard, including in relation to the elaboration of a convention on the basis of the draft articles, as well as on any practice in relation to the application of the articles and principles;

6. *Decides* to include in the provisional agenda of its sixty-fifth session the item entitled "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm".

Annex

Prevention of transboundary harm from hazardous activities

The States Parties,

Having in mind Article 13, paragraph 1 (a) of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Bearing in mind the principle of permanent sovereignty of States over the natural resources within their territory or otherwise under their jurisdiction or control,

Bearing in mind also that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,

Recalling the Rio Declaration on Environment and Development of 13 June 1992,

Recognizing the importance of promoting international cooperation,

Have agreed as follows:

Article 1

Scope

The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2
Use of terms

For the purposes of the present articles:

(a) "Risk of causing significant transboundary harm" includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm;

(b) "Harm" means harm caused to persons, property or the environment;

(c) "Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(d) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are planned or are carried out;

(e) "State likely to be affected" means the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk;

(f) "States concerned" means the State of origin and the State likely to be affected.

Article 3
Prevention

The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

Article 4
Cooperation

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.

Article 5
Implementation

States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.

Article 6
Authorization

1. The State of origin shall require its prior authorization for:

(a) Any activity within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control;

(b) Any major change in an activity referred to in subparagraph (a);

(c) Any plan to change an activity which may transform it into one falling within the scope of the present articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present articles. Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present articles.

3. In case of a failure to conform to the terms of the authorization, the State of origin shall take such actions as appropriate, including where necessary terminating the authorization.

Article 7
Assessment of risk

Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

Article 8
Notification and information

1. If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response from the State likely to be affected.

Article 9
Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time frame for the consultations.

2. The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Article 10
Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances, including:

(a) The degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(b) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;

(c) The risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(d) The degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;

(e) The economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) The standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 11
Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the State of origin may involve a risk of causing significant transboundary harm to it, it may request the State of origin to apply the provision of article 8. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 8, it shall so inform the requesting State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations in the manner indicated in article 9.

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period.

Article 12
Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information concerning that activity relevant to preventing significant transboundary harm or at any event minimizing the risk

thereof. Such an exchange of information shall continue until such time as the States concerned consider it appropriate even after the activity is terminated.

Article 13
Information to the public

States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 14
National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets or concerning intellectual property may be withheld, but the State of origin shall cooperate in good faith with the State likely to be affected in providing as much information as possible under the circumstances.

Article 15
Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 16
Emergency preparedness

The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations.

Article 17
Notification of an emergency

The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.

Article 18
Relationship to other rules of international law

The present articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.

Article 19
Settlement of disputes

1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties to the dispute, including negotiations, mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement on the means for the peaceful settlement of the dispute within a period of six months, the parties to the dispute shall, at the request of any of them, have recourse to the establishment of an impartial fact-finding commission.

3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.

4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.

5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.

6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.